In the

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-333

UNITED AIR LINES, INC.,

Petitioner,

vs.

CAROLYN J. EVANS,

Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Respondent Carolyn J. Evans respectfully urges that the decision of the United States Court of Appeals for the Seventh Circuit be affirmed.

QUESTION PRESENTED FOR REVIEW

Can a current and continuing seniority practice which perpetuates the effects of past discrimination be held violative of Title VII of the Civil Rights Act of 1964?

STATUTE INVOLVED

Title VII of the Civil Rights Act of 1964 (hereinafter the "Act"), 42 U.S.C. §2000e *et seq.*, specifically Sections 703(h), 706(e) and 706(g) thereof (42 U.S.C. §§2000e-2(h), 2000e-5(e), and 2000e-5(g).)

Section 703(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29.

Section 706(e)

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings

with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Section 706(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 2000e-3(a) of this title.

STATEMENT OF THE CASE

In order to clarify both the record and the issues involved herein, and in light of certain statements and assumptions made in briefs *amici curiae* filed in support of Petitioner, Respondent Evans wishes to add the following to the summary offered by United in its Statement of the Case.

1. Carolyn Evans does not seek the four years of back pay which were lost as a result of United's unlawful termination of her in 1968; rather, she seeks seniority credit which she is currently being denied due to United's reliance upon her 1968 termination as a break in her service for current seniority purposes. The back pay and other relief sought in addition to seniority credit are limited to those benefits, wages, or perquisites which Mrs. Evans would have enjoyed since her February 16, 1972 rehire had she not been victimized by United's current practice with respect to her seniority, and were she instead being credited with seniority both from her original date of hire (1966) and for all periods she has actually worked for United (1966-68, and 1972 to the present).

There are thus *two* types of prospective seniority sought here — credit for actual service, on the one hand, and constructive seniority, on the other. Mrs. Evans is being denied *both*.

2. It is somewhat misleading to state that Mrs. Evans simply seeks a restoration of seniority she "lost . . . in 1968", because seniority has meaning only in a prospective on-the-job context. Carolyn Evans argued below, and the Court of Appeals accepted her position, that a "loss" has occurred and has been implemented on every day of her re-employment, continues to the present, and will

continue tomorrow unless checked. For example, whenever United determines Mrs. Evans' wages, her flight assignments, her fringe benefits, and whether or not she is to be laid off or recalled, it engages in its seniority practice. Each time, United has admittedly chosen to treat the 1968 termination as a break in service, and by currently relying on that past act, it has inexorably tied that past discrimination[1] to its present treatment of Mrs. Evans' seniority. Thus, Mrs. Evans' theory of relief, advanced both in District Court and on appeal, and accepted by the Court of Appeals, consists of two premises:

(a) That the "continuing practice" challenged is that ongoing seniority practice (the "continuing discrimination"), and that her charge was timely filed with respect thereto; and

(b) That said practice is *illegal* because it perpetuates the effects of past discrimination, and actively enables prior discrimination to reach effectively into the present. (Mrs. Evans thus finds herself with less seniority, fewer benefits, and less protection against layoff, than two types of similarly situated males: *i.e.*, males hired at the same time or later than she originally was, and males with the same or less actual length of service with United.)

3. Since (1) this case has arisen on a motion to dismiss the complaint, (2) a trial and opportunity to adduce evidence have yet to be afforded Mrs. Evans, and (3)

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[1] The "no-marriage rule" for stewardesses, which occasioned the 1968 termination, was found to be violative of Title VII in *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir., 1971) *cert. denied*, 404 U.S. 991 (1971).

opposing parties have incorrectly assumed that United's seniority practice with regard to Mrs. Evans is based upon a simple across the board continuous-time-in-service system, we wish to point out the following additional facts which we intend to prove at trial, if necessary, and which may be relevant to the Court's consideration of this case:

(a) Under United's collectively bargained seniority system as set forth in the applicable collective bargaining agreement(s) seniority is to be deemed broken by termination of employment in the case of a stewardess "*who resigns or whose services with the Company are permanently severed for just cause. . . .*" (1972-1974 Agreement between United and The Air Line Stewardesses and Flight Stewards as represented by The Air Line Pilots Association, International, Section 9D). Since Mrs. Evans' termination was neither a voluntary resignation nor a just cause discharge, and since we also expect to show, if necessary, that United in practice does from time to time credit ordinary rehires with past seniority, it is clear at the very least that the seniority *practice* she is challenging does not possess whatever bona fides or across-the-board consistency may be theoretically attributable to the overall *system* of seniority maintained by United. It is in this context that Mrs. Evans has consistently argued that she does not attack United's seniority system, but instead merely challenges United's current *practice* with respect to her seniority, whereby she is treated as having had a break in service and is thus wrongly placed in the seniority *system*. (As alleged in the complaint, Mrs. Evans filed a grievance, which United denied, under the collective bargaining agreement.)

(b) Mrs. Evans is prepared to prove that, upon her 1972 rehire, she was assigned the same personnel file number as she had during her 1966-68 period of employment. Thus, United obviously knew she was not a stranger when it rehired her.

SUMMARY OF ARGUMENT

As the Court of Appeals correctly reasoned, the root issue in this case is not whether Mrs. Evans' EEOC charge was timely filed. Since the employment practice here being directly challenged is United's current seniority practice with respect to Mrs. Evans (not the 1968 termination), and since the charge was timely filed with respect to that seniority practice, the real issue here is whether or not that challenged seniority practice is illegal.

The Court of Appeals correctly concluded that said practice is illegal because it perpetuates and actively gives present effect to prior post-Act discrimination against Mrs. Evans — namely, her prior illegal termination. This is so because United today relies on that termination as a break in service. Far from seeking mere redress for a past wrong, or confusing mere passive effects with substantive wrongs, Mrs. Evans seeks an end to a current seniority practice by which United chooses to visit its past bias upon her once again in a new form today. That the challenged seniority practice may be characterized as an offense of "omission" rather than "commission" is a purely semantic distinction devoid of significance under our legal system.

The Court of Appeals correctly applied settled and consistent legal principles — firmly grounded in the decisions of this Court, the several Courts of Appeal, and the expressed intention of Congress — and thereby

reached a sound and logical result. United has demonstrated neither the legal insufficiency of Mrs. Evans' claim, nor the inapplicability of her theory of relief to the facts she alleges.

Even more importantly, the result below withstands analysis on policy grounds. No new loophole in the Act's time limits is being opened here. As to the risk of stale claims, for example, the principle of laches is available to forestall any possible prejudice to prospective defendants' ability to defend competently. In the instant case, no prejudice has been alleged or shown, and to have required Mrs. Evans to file when United would have required her to (*i.e.*, within 90 days after her prior termination) would be to have the limitations period run and end before the offense was even committed. Thus, Carolyn Evans did not sleep on the rights she seeks to enforce here.

Evans is compatible with *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594 (9th Cir., 1975), and no anomaly is thereby created between the rights of past discriminatees who are rehired and those who are not. The Seventh Circuit's decision will not discourage employers from rehiring former discriminatees; if anything, it will have the opposite effect. In *Collins*, the refusal to hire was not based on prior discrimination, nor was it even alleged to be, and so the offense charged was but a mere "shadow" of the past. Here, the current practice is a new one which is admittedly based on prior discrimination.

The *Evans* decision follows both the letter and the spirit of this Court's reasoning in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 96 S. Ct. 1251 (1976), which recognized that attacks on post-Act seniority prac-

tices challenged as perpetuating the effects of prior post-Act discrimination are not barred by Section 703(h) and are thus cognizable under Title VII. Furthermore, *Franks* clearly disposed of the broad claim that the requested seniority relief in this case might have unsettling effects on other employees; and there is still ample room for the trial court to fashion an appropriate remedy to minimize any undue hardship.

But if this Court were to disturb *Evans*, the pre-established principles for which it stands would be undermined; Congress' express purpose would be undone; prior landmark decisions of this Court would be tacitly overruled, as would heretofore accepted rulings of at least six Courts of Appeal; and there would result a confusing and far-reaching retrenchment in derogation of the broad goal under Title VII of eradicating employment discrimination. Subtle but pervasive employment practices now recognized as illegal because they perpetuate the effects of past discrimination would no longer be subject to effective attack. In order to perserve the Act as Congress intended it to be used, the Court of Appeals' decision must be affirmed; Carolyn Evans must be allowed to proceed to the trial she deserves.

ARGUMENT

I.

The Time Limit Of Section 706(e) (Formerly 706(d)) Was Satisfied In This Case.

At the time Mrs. Evans filed her EEOC charge herein[2] (February 21, 1973), Section 706(e) of the Act required her to file within 180 days of the occurrence of the alleged unlawful employment practice. Mrs. Evans did so. There has therefore been no departure from the plain language of the Act.

The "employment practice" here being challenged is United's seniority practice with respect to Mrs. Evans. That practice is clearly current and continuing. It was occurring within 180 days of the day she filed her charge; indeed, it was occurring on the very day she filed her charge. She was injured by it then, is injured by it today, and will be injured by it in the future: United engages in and will engage in its challenged seniority practice whenever it makes flight assignments to Mrs. Evans, computes her paycheck, schedules her vacation, prepares to lay off or recall flight attendants, determines her pension entitlements, or utilizes "benefit"—or "competitive"--seniority in any other aspect of her employment. The fact is that United's practice is continuing in nature; whether that practice be viewed as one of "commission" or as one of "omission", a beguiling but purely semantic differentiation urged by *Amici* Airlines, is of no consequence. The practice exists, and it obviously is the product of United's present, continuing, conscious and deliberate selection of one of several possible courses

[2] As the Court of Appeals was informed at oral argument, the Commission accepted jurisdiction of Mrs. Evans' charge as timely.

of action or inaction with respect to Mrs. Evans' seniority status. (*Amici* Airlines' semantic argument that employer "inaction" cannot be viewed as a policy or practice, if accepted, would make a mockery of the common and statutory law of civil wrongs. For example, failure to pay minimum wages or overtime pay when due, failure to hire blacks or other minority persons, failure of an employer to pay contractually required pension contributions to a Taft-Hartley trust, and countless other traditional bases of suit are all litigiable wrongs of "inaction".)

The proposition, accepted by the Court of Appeals here, that a charge filed during the operation of a continuing employment practice or policy is timely, has been firmly established. There is no attack being made here upon a Congressionally mandated time limit; rather, Mrs. Evans' theory of timeliness is in clear accord with Congressional intent, and failure to accept that theory would ignore that intent.

Congress clearly anticipated and provided for the possibility that there could be "continuing violations" and that a charge could be timely filed over 180 days after the *commencement* of a practice but during the ongoing operation thereof. This is the clear import of the 1972 provision, in Section 706(g) of the Act (*supra*), that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission". For the quoted provision would have meaning *only* in a case such as this—where the challenged practice or policy, and the injury resulting therefrom, are of a continuing nature.

That this was in fact the true Congressional intent is confirmed by the legislative history of the 1972 Amendments to Title VII. The Conference Report adopted by both the House and the Senate contained the following

language in reference to §706(e) (the time limits provision):

> "This subsection provides that charges be filed within 180 days [or 300 days if proceedings are filed with a state or local agency] of the alleged unlawful employment practice. *Court decisions under the present law have shown an inclination to interpret this time limitation so as to give the aggrieved person the maximum benefit of the law; it is not intended that such court decisions should be in any way circumscribed by the extension of the time limitations in this subsection. Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued,* and other interpretations of the courts maximizing the coverage of the law are not affected", 118 Cong. Rec. 7167 (Senate, March 6, 1972); 118 Cong. Rec. 7565 (House, March 8, 1972). (Emphasis added.)

If that principle of continuing wrongs is not applied here, then it cannot logically be applied at all and the foregoing language would be rendered meaningless.

In accepting Mrs. Evans' theory of timeliness based upon the existence of a continuing employment policy or practice, the Seventh Circuit acted in accordance with widely established case law on point—much of which existed when Congress amended Title VII in 1972[3]—covering a wide variety of "continuing practice" situations

[3] As the 1972 Conference Report noted: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII". 118 Cong. Rec. 7564 (House, March 8, 1972). This was noted in *Franks, supra,* 424 U.S. at 765, n. 21.

(including many wherein a facially neutral seniority practice was being challenged).[4]

As one court aptly summarized the state of the law:

> "It is clear that the filing of a charge with the EEOC within 90 days [extended to 180 or 300 days in 1972] after the alleged unlawful practice occurs is a jurisdictional prerequisite to a subsequent court suit under Title VII. . . . However, if the alleged violation is

[4] *Bartmess* v. *Drewrys U.S.A., Inc.* 444 F.2d 1186 (7th Cir. 1971), *cert. den.* 404 U.S. 939 (1971); *Cox* v. *U.S. Gypsum Company,* 409 F.2d 289 (7th Cir., 1969); *Burwell* v. *Eastern Air Lines,* 394 F.Supp. 1361, 1367 (E.D. Va., 1975) (loss of seniority); *Tippett* v. *Liggett & Myers Tobacco Co.,* 316 F.Supp. 292 (M.D. N.C., 1970) (loss of seniority); *Healen* v. *Eastern Air Lines,* ..... F.Supp. ....., 8 FEP Cases 917 (N.D. Ga., 1973) (loss of seniority); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C. Cir., 1973); *Sciaraffa* v. *Oxford Paper Co.,* 310 F. Supp. 891 (D.Me., 1970); *Kohn* v. *Royall, Koegel & Wells,* 59 F.R.D. 515 (S.D. N.Y., 1973); *app. dism.* 496 F.2d 1094 (2d Cir., 1974); *Watson* v. *Limbach Company,* 333 F.Supp. 754 (S.D. Ohio, 1971); *Jamerson* v. *Trans World Airlines,* ..... F.Supp. ....., 11 FEP Cases 1475 (S.D. N.Y., 1975) (loss of seniority); *Jamison* v. *Olga Coal Co.,* 335 F.Supp. 454 (S.D. W.Va., 1971); *Moreman* v. *Georgia Power Co.,* 310 F.Supp. 327 (N.D. Ga., 1969). Moreover, said rationale implicitly underlies the acceptance of plaintiffs' theory of relief in *Griggs* v. *Duke Power Company,* 401 U.S. 424 (1971), where this Court permitted continuing discriminatory practices and policies to be challenged under Title VII, and the several Court of Appeals and other cases cited in Part II of this Brief, wherein continuing seniority, transfer and other practices were challenged as illegal for perpetuating the effects of past discrimination and the time limits of the Act were implicitly assumed to be satisfied. Thus, for example, *Robinson* v. *Lorillard Corp.,* 444 F.2d 791, 795-796 (4th Cir., 1971), *cert. den.* 404 U.S. 1006 (1971) stands for the proposition that a facially neutral seniority practice which perpetuates the effects of past discrimination is in fact a continuing violation of Title VII.

deemed to be 'continuing', it has been consistently held that the 90 day period does not bar an ensuing court action". *Sciaraffa* v. *Oxford Paper Company, supra*, n. 4, 310 F.Supp. at 896.

From the very outset of this case, Mrs. Evans has conceded both that the timely filing of an EEOC charge is a jurisdictional prerequisite to suit, and that, were she simply and solely attacking her 1968 termination, rather than a current employment practice, her claim would be time-barred. Conversely, United has never disputed the proposition that if its challenged current seniority practice is unlawful under the Act, then Mrs. Evans' EEOC charge was timely filed. Thus, the real issue here has nothing to do with time limits; rather, the question is, purely and simply, is the challenged seniority practice *unlawful?* The Court of Appeals correctly decided that issue in the affirmative.

II.

United's Current Seniority Practice Is Unlawful As Applied To Mrs. Evans Because It Is Based On, And Perpetuates The Effects Of, Prior Discrimination.

Carolyn Evans was no stranger to United Air Lines when she was reinstated in 1972, and United knew it. By relying on the 1968 termination as creating a break in service, and giving effect to that break in service in its current seniority practice with respect to Mrs. Evans, United is actively enabling that prior discrimination to reach effectively into the present. United thus visits new losses upon Mrs. Evans and creates a present disparity, for Mrs. Evans finds herself at a significant disadvantage as compared with male flight attendants who (1) were hired between 1966 and 1972 (i.e., at the same

time or even later than she originally was) and/or (2) have less actual length of service than she has.

In ruling that United's seniority practice is therefore unlawful with respect to Mrs. Evans, the Seventh Circuit followed Title VII case law which had been previously established by numerous Courts of Appeal as well as this Court, and in many other decisions. These cases largely preceded the 1972 amendments to Title VII, and must be presumed to have Congressional approval (see note 3, *supra*). In fact, further language in the 1972 Conference Report supports the proposition that an employment seniority practice which perpetuates the effects of past discrimination is within the purview of Title VII. The Report notes, with respect to Section 706(g), that the "courts have stressed" that the attainment of Title VII's make-whole objective

> "rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires *that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination*". 118 Cong. Rec. 7565 (House, March 8, 1972); 118 Cong. Rec. 7168 (Senate, March 6, 1972). (Emphasis supplied). (The word "aggrieved" here used by Congress in referring to persons suffering the effects of discrimination is the same word which appears in Section 706(b) of the Act, as amended, describing those whose charges are subject to the processes of Title VII.)

Moreover, as this Court noted in *Franks, supra*, 424 U.S. at 765, n. 21, the Senate Report specifically referred to the problem of "perpetuation of the present effect of pre-Act discriminatory practices through various insti-

tutional devices". S. Rep. No. 415, 92d Cong., 1st Sess., at 5 (1971).

As the Seventh Circuit noted in its opinion below (Appendix, at 40, n. 15), this Court stated in *Griggs, supra*, 401 U.S. at 430:

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[5]

In some respects, *Evans* is a more compelling case for relief than *Griggs*. In *Griggs*, the employer's practices were found discriminatory because they perpetuated the effects of past discrimination, even though that past discrimination antedated Title VII and also was in part *not even the legal responsibility of the defendant employer*. The statistical disadvantage suffered by blacks in that case under testing and diploma requirements was, rather, a perpetuation of the effects of "society's" past socio-economic discrimination in education and environment, as to which the employer therein could never have been held

[5] The fact that United may have discriminated "unintentionally" is thus irrelevant, as this Court has often reiterated:

> "Title VII is not concerned with the employer's 'good intent or absence of discriminatory intent' for 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation'. Griggs v. Duke Power Co., supra, 401 U.S., at 432, 91 S.Ct., at 854. See also Watson v. City of Memphis, 373 U.S. 526, at 535, 83 S.Ct. 1314, at 1319-1320, 10 L.Ed.2d 529; Wright v. Council of City of Emporia, 407 U.S. 451, at 461-462, 92 S.Ct. 2196, at 2202-2203, 33 L.Ed.2d 51." *Albermarle Paper Company* v. *Moody*, 422 U.S. 405, 422, 95 S.Ct. 2362, 2374 (1975).

liable. Here, the past discrimination which United now actively perpetuates through its current practice is in fact *its own*, is subject to little dispute, and was in fact ruled illegal in *Sprogis, supra.*

Indeed, the major point of distinction really being made by *Amici* Airlines as to *Griggs* and the Court of Appeals cases cited below is that the current practices there challenged were acts of "commission" whereas *Evans* allegedly involves a practice of "omission"; the logical and practical untenability of this distinction has already been noted above. Far from challenging United's "failure to remedy" a time-barred wrong, Mrs. Evans attacks a current practice which *gives new effect* to a past wrong, and which does so in a uniquely damaging way. Moreover, the analogy suggested by *Amici* Airlines (on p. 23 of their Brief) to distinguish *Griggs*, that is, the example of a one-time denial of a salary increase—is totally inapposite. Denial of relevant seniority—unlike a one-time denial of a salary increase—continually affects *in futuro* the entire gamut of benefits to be derived from the employment relationship as well as the very existence of that relationship in times of business stress. Moreover, just as the policy of denying future salary increases to an employee who suffered a past denial thereof is illegal for perpetuating the effects of past discrimination (which *Amici* suggest *would be* a cognizable injury under *Griggs*), so too, United's practice here forever denies or curtails a whole realm of future benefits to Mrs. Evans, by today treating her as having had an immutable break in service in the past and thereby perpetuating past bias into the future. Of course, *Amici* themselves undermine the impact of their own analogy by stating their recognition that there can be valid challenges to seniority practices under *Griggs* (p. 22, n. 17); the fact that Mrs. Evans challenges

a mere seniority "practice" rather than seeking to dismantle the "system" as a whole is, if anything, even *more* reason to grant her the relief she seeks, since the principle is identical while the relief is less cataclysmic. (Moreover, United's claim that this is not a so-called "pattern and practice" suit is a difference in procedural form, not substance. It would indeed be remarkable if this Court were to penalize a private litigant for having initially filed her suit as an individual rather than as a class action. As it happens, there may well be many other stewardesses who find themselves suffering from the same wrong. Only a trial can settle that question.)

In *Acha* v. *Beame,* 531 F.2d 648 (2d Cir., 1976), the Court of Appeals, in reversing dismissal of the complaint, held that a facially neutral, date-of-hire seniority system (like United's here) was discriminatory *as applied to plaintiffs* because it perpetuated the effects of past sex discrimination against them (there, a previous refusal to hire based on sex).[6] By relying on date-of-hire in computing seniority in the case of the identifiable victims of past hiring bias, the employer disadvantaged said plaintiffs as compared with males who were hired at the same time or later than plaintiffs would have been had the prior discrimination not occurred. Similarly, by relying on date-of-rehire and treating her prior illegal termination[7] as a break in service, United has disadvantaged

[6] In that case, EEOC charges were filed well beyond the 706(e) limitation period with respect to the hiring discrimination but, as here, during the pendency of the seniority practice. There, as here, it was the seniority practice that was being attacked.

[7] This Court recognized in *Franks, supra,* 424 U.S. at 768, that discriminatory hiring and discharges are "related 'twin' areas".

Mrs. Evans as compared with males hired at the same time or later than she originally was, and males with less length of service than she actually has.

In fact, virtually every other Circuit Court of Appeals which has had an opportunity to rule on the issue, and whose ruling has either not reached or has been left undisturbed by this Court, has held, as did the Seventh Circuit, that if, as here, a current, facially neutral seniority practice perpetuates and locks in the effects of prior discrimination, then that current practice will be found unlawful under Title VII even if the policies which gave rise to the past discrimination are no longer in effect. *U. S.* v. *Bethelehem Steel Corp.,* 446 F.2d 652 (2d Cir., 1971); *Robinson* v. *Lorillard Corp.,* 444 F.2d 791 (4th Cir., 1971), *cert. den.* 404 U.S. 1006 (1971); *Local 189, United Papermakers* v. *U.S.,* 416 F.2d 980 (5th Cir., 1969), *cert. den.* 397 U.S. 919 (1970)[8]; *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 236 (5th Cir., 1974); *Head* v. *Timken Roller Bearing Co.,* 486 F.2d 870 (6th Cir., 1973); *U.S.* v. *N.L. Industries,* 479 F.2d 354 (8th Cir., 1973); *Jones* v. *Lee Way Motor Freight, Inc.* 431 F.2d 245 (10th Cir., 1970), *cert. den.* 401 U.S. 954 (1971). The EEOC has ruled the same way in a case virtually on all fours with *Evans, EEOC Dec. No. 71-413,* 3 FEP Cases 233 (1970). (This Court ruled in *Griggs, supra,* 401

[8] As noted in *Kennan, infra,* a 1972 Senate Report cites *Papermakers* as a case which has which has "contributed significantly to the Federal effort to combat employment discrimination". S. Rep. No. 92-415, 92nd Cong., 2d Sess. 5 (1972). *Evans* is an even more compelling case for relief than *Papermakers,* where the past discrimination occurred prior to the 1965 effective date of Title VII.

U.S. at 434, that the Commission's interpretations of Title VII are entitled to great deference.)[9]

Moreover, the one pertinent major appellate case upon which this Court has ruled and which heretofore had provided possible contrary authority—*Jersey Central Power & Light Company* v. *International Brotherhood of Electrial Workers,* 508 F.2d 687 (3d Cir., 1975)—was vacated and remanded for further consideration in light of *Franks. E.E.O.C.* v. *Jersey Central Power & Light Co.*, ... U.S. ....., 96 S.Ct. 2196 (1976).[10]

As the Fifth Circuit said in *Papermakers*:

> "Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias." 416 F.2d at 988.

So, too, every time Carolyn Evans (or another similarly-situated female) bids against a male flight attendant, or is involved in any employment event tied to either "benefit"

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[9] Among the many other cases in accord with this rationale are the closely analogous *Tippett, Healen, Burwell,* and *Jamerson* cases, *supra,* and *Payne* v. *Travenol Laboratories,* 416 F.Supp. 248, 12 FEP Cases 770 (N.D. Miss., 1976). See also *Marquez* v. *Omaha District Sales Office,* 440 F.2d 1157 (8th Cir., 1971); *Nance* v. *Union Carbide Corp.*, ... F.2d ....., 13 FEP Cases 231, 238-239 (4th Cir., 1976).

[10] *Watkins* v. *United Steel Workers,* 516 F.2d 41, 44-45 (5th Cir., 1975), is distinguishable from the instant case in that there, unlike here, the plaintiffs challenging the seniority practice were not the *identifiable victims* of past discrimination, as the Court there made clear in its meticulously worded holding. This distinction was noted in *Payne, supra,* 416 F.Supp. at 265, and is significant in light of *Franks* and *Acha, supra.*

or "competitive" seniority, the old sexual classification (i.e., the no-marriage rule for females) is reasserted by United, and she suffers anew for United's previous bias.

One of the many applicable cases in the *Papermakers* line is the strikingly parallel decision in *Tippett* v. *Liggett & Myers, supra,* n. 4. In that case, female plaintiffs had been discriminatorily laid off from the bottom of the then female seniority list in July, 1965. They were still separated from employment when, *two years later,* the employer computed a "permanent rate", based upon the 90 days ending May 31, 1967, which allowed active employees previously segregated by race and sex to transfer among departments without a reduction in wages. Plaintiffs were not then employed and therefore were not assigned a "permanent rate". They recommenced their employment in June, 1967, but waited *nearly a year* before filing EEOC charges on May 18, 1968.

Liggett & Myers made the same arguments advanced by United here—that the charge was untimely and that no present discrimination was taking place. The Court refused to accept these arguments, realizing that to do so would allow the employer in that case—like United here—to use "its own earlier unlawful discrimination . . . as an excuse to continuously repeat and multiply its further acts of unlawful discrimination." (316 F.Supp. at 295). The Court found the ongoing denial of seniority (permanent rate status) to plaintiffs and the resulting disparity with similarly-situated males to be a continuing violation of Title VII—because it perpetuated the effects of past discrimination. This was a case, said the Court,

> "of prior discrimination reaching effectively into the present. Placed behind all employees holding a permanent rate, plaintiffs would conceivably be subject

> to lower wages, greater risk of future layoffs, and diminished chances of promotion and transfer." (316 F.Supp. at 296).

Unlike men originally hired at the same time or even after they were, the *Tippett* plaintiffs were continuously denied the seniority advantage of permanent rate status which they would have had but for prior discrimination as presently made effective. Similarly, Mrs. Evans—unlike males hired between 1966 and 1972—is continuously being denied the seniority status she would have had but for United's past discrimination and present practice towards her. In both cases, these women returned to work only to suffer from current on-the-job seniority disparity traceable to past discrimination.

United argues that the application of this widely accepted rationale to the case at bar "effectively eliminates the time limitation set forth in Section 706(d) [now 706(e)] of the Act", and could revive stale claims of many years' vintage. This alarmist position is unsound for several reasons.

First, the established principles for which *Evans* stands do not constitute an unfair trap for the innocent employer. Carolyn Evans has in fact filed a timely charge vis-a-vis the challenged employment practice. That seniority practice is no mere "effect"—it is an *active policy* which creates a current disparity. United itself opened the door to this litigation by explicitly relying in the present on its own past discrimination to penalize in a new way its own prior victim; United has no one to blame but itself. Under the circumstances, United is knowingly responsible for the relation between its present practice and its past discrimination.

Second, consistency and logic dictate that to deny the applicability of the rationale adhered to by the Seventh

Circuit in this case would be to deny its applicability to the many cases set forth above, including rulings by the Second, Fourth, Fifth, Sixth, Eighth and Tenth Circuits as well as this Court, and would throw heretofore settled employment discrimination law into a state of chaos. For United is not merely seeking to preserve a time limitations rule; that rule is not in issue. United is asking this Court to reject an established, substantive principle of Title VII law; it is asking this Court to declare that an employer may deny benefits to or otherwise injure an employee by applying to that employee a current facially neutral employment practice which creates a current disadvantage and disparity by giving present effect to prior discrimination against that employee by that employer. If that is so, the result would be disastrous. It would mean, in effect, that facially neutral employment practices—such as the invidious practices this Court struck down in *Griggs*—would no longer be attackable, no matter how damaging and pervasive they were. Where a present policy is not facially neutral, it is of course attackable *per se;* bu where, as in *Griggs,* the present policy is facially neutral, the attack must perforce be based upon the fact that the challenged practice perpetuates and locks in the effects of past discrimination. United seeks an end to such challenges and would thwart Congress' purpose in enacting Title VII.

Thus, United does not seek to prevent the opening of a new floodgate; rather, it seeks to close a well-traveled avenue of relief. And, although they have recently been subjected to a great deal of publicity, there is no reason to believe that the cases in which, as here, a seniority practice is challenged as perpetuating the effects of prior discrimination would not continue to constitute a relatively small percentage of Title VII cases. Fur-

thermore, of those cases that do arise, established law has placed even further limits. First, under *Evans,* this Court's ruling in *Franks, supra,* and the *Acha* case, *supra,* only the identifiable victims of past discrimination would be entitled to relief; moreover, as noted above, in 1972 Congress limited retroactive back pay relief to two years prior to the date of the charge, and if further limitations are to be placed, Congress may do so. (Mrs. Evans seeks only *one* year's backpay differential).

But even without Congressional action, the Courts already have ample tools available to protect against the risk of litigation of truly stale claims. For one, the staleness of a claim may well hurt the potential *plaintiff* as much as, or even more than, it hurts the potential defendant, and will obviate the risk of prejudice to defendant. Under Title VII, it is well established that plaintiff must bear the burden of proving a prima facie case. Where plaintiff is proceeding on the theory of relief advanced here, that burden is even greater. The plaintiff's own credibility and competence to testify may be impaired by passage of time. And he must still bear the burden of proving past discrimination, a present act in perpetuation thereof, a current disparate effect thereof, that he himself was an actual victim of both the past discrimination and the current practice, and that the two are related as to him.

More importantly, if the defendant can demonstrate prejudice (which United has failed to even allege here), the Court may apply *the principle of laches,* and may deny relief (despite a technically timely filing) on that basis. (See, for example, *EEOC* v. *American National Bank,* ..... F.Supp. ....., 13 FEP Cases 572 (E.D. Va., 1976).) Indeed, the Ninth Circuit, which has approved

Evans (as noted below), tacitly applied the doctrine of laches in *Griffin, infra* (Part III), where plaintiffs sued under 42 U.S.C. §1981 in 1971 for seniority credit for time lost as a result of allegedly discriminatory layoffs over 20 years earlier; the Court held that "in these circumstances" suit was barred. 478 F.2d at 1120.

Naturally, laches should not be applied to *Evans.* Here, it is unlikely that the past discrimination will be subject to much factual dispute as to key dates, events, etc.; the prior bias was part of an open, admitted, and across-the-board policy which has been decreed unlawful by the Courts, and has been the continual subject of wide-spread litigation. There has been no showing of prejudice to United in preparing its trial defense on the merits. Moreover, the very speed with which this case reached this Court evidences the fact that the controversy largely turns upon questions of law rather than difficulties in unearthing the facts.

To require Mrs. Evans and other plaintiffs like her to file charges of this nature sooner would create an illogical and untenable situation. For one thing, until she was re-employed, Mrs. Evans had no idea whether United would re-employ her and whether it would give her credit for her prior service or not. (In practice, we understand United sometimes has given ordinary rehires prior service credit.) Seniority is meaningful only prospectively, and on-the-job. To force Mrs. Evans to file charges and/or a lawsuit sooner, far from eliminating stale claims, would have been to force her to burden the already flooded EEOC and the Courts, at her and the taxpayers' expense, with a premature challenge to a seniority practice which did not yet affect her *and which did not yet even exist as to her.* United's argument, if accepted, would

thus have the limitations period end *before the offense is committed.*

Although it is true that Mrs. Evans filed her charges a year after her rehire, she is still entitled to relief. First, as a matter of law, since the challenged offense is a continuing one, she clearly was legally timely. Second, as for the question of whether or not the principle of laches should nevertheless bar her from relief, several factors apply in her favor. For example, she filed a grievance soon after her probationary employment status ended (see Respondent's Brief in Opposition to Petition, at 3, n. 2), putting United on notice well before a year had passed. Further, as one commentator on the *Evans* case recently noted:

> ". . . . [G]iven the novelty of her claim and the fact that she, like most other Title VII claimants, is not a lawyer, one year is hardly an unconscionable period, particularly on a claim of continuing wrong. Just as Title VII plaintiffs are not held to professional pleading standards . . ., so they ought not to be held to the standards of expedition demanded of corporate employers advised by specialized counsel on permanent retainers."[11]

Under the circumstances, this is a case for the Court to conclude, on equitable grounds, that the interest of protecting defendant from stale claims is outweighed by the interests of justice in vindicating plaintiff's rights. *Burnett* v. *New York Central R.R. Co.,* 380 U.S. 424, 428 (1964).

The theory of relief necessarily accepted by the Seventh Circuit in this case has historically been applied in

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[11] Douglass T. Cassel, Jr., Draft of Annual Review of Seventh Circuit Civil Rights Decisions to be published in the forthcoming issue of the Chicago-Kent Law Review, at 10-11 (1976). *See* also *Love* v. *Pullman,* 404 U.S. 522 (1972).

situations, like this one, where the challenged action by the employer is a *seniority* practice; in such cases, the practice is characteristically of a continuing nature and, while uniquely future-oriented, is perforce tied to employment history and past actions affecting length-of-service. There need be no fear that the rationale which was once again correctly applied by the Court of Appeals here in a seniority context will be dramatically extended beyond its present scope. Were that to occur in some future case, the time for review by this Court would be then—not now.

United suggests that it is not unreasonable to require Carolyn Evans to have taken timely steps at the time of her termination to protect her rights. The claim Mrs. Evans could have pressed in 1968 is not being "unbarred" here. For not challenging the 1968 termination at that time, Mrs. Evans, like the plaintiffs in the seniority cases cited above, has in fact already suffered an appropriate permanent and irretrievable loss of rights—chiefly, four years of back pay (1968-1972) which are concededly beyond the scope of this litigation. The seniority cases cited above involved past discrimination only because and to the extent that the employers there chose to actively perpetuate the past bias through their current practices. Similarly, this case involves the 1968 termination only because, and to the extent that, United has chosen to rely on that past discrimination and actively perpetuate in new form certain effects thereof through its current practices. Mrs. Evans seeks redress only for the injury and disadvantage she has suffered since her reinstatement due to the current seniority practice which she is challenging herein. Is it any less reasonable to require United to bear the responsibility for its present

actions, whereby it openly uses its own past discrimination as an excuse to deny Mrs. Evans benefits today?

In sum, if *Griggs* and the *Papermakers* line of cases are still the law of the land (as Congress assumed when it acted in 1972), then *Evans* must be affirmed. If the bases for reversal asserted by United and *Amici* are accepted, what heretofore had been solidly established and accepted law in furtherance of the express will of Congress will have become hollow echoes of a time when the eradication of employment discrimination was truly a national goal of the highest priority.[12]

III.

The Cases Adduced By Opposing Parties Are Inapposite.

Mrs. Evans' position, and the conclusion of the Seventh Circuit, withstand close consideration of the cases which have been cited against her.

Of the cases cited by United, many stand simply for the general proposition that satisfaction of the Act's time limits is a jurisdictional prerequisite to suit. The parties agree on that score. Other cases are also vulnerable in that they are prior decisions of the Seventh Circuit,

[12] Such an adverse decision would not only wipe out important advances made to date, and insulate from attack practices which this Court has itself condemned; in the seniority area especially, it would also necessarily cause continual future repercussions for the past, present and future victims of employment discrimination. Whatever gains—both voluntary and by court order—are made in eradicating job bias, those gains will have been harder to achieve, and will always be subject to being swept away, as by layoff of rehired discriminatees, through the use of seniority practices such as that being challenged here.

which cannot be used now to bar *Evans*, and in any event involved unrelated fact patterns. Most of the remaining cases either involved only discharges and nothing more—unlike the case at bar, wherein a current and continuing on-the-job seniority practice has been challenged—or are otherwise easily distinguished. Thus for example, in *Griffin* v. *Pacific Maritime Assoc.*, 478 F.2d 1118 (9th Cir., 1973), *cert. denied*, 414 U.S. 859 (1973), plaintiffs' Title VII claim was deemed barred for failure to exhaust administrative remedies since they had filed no charges at all with any appropriate agency; the other statute pursuant to which they proceeded—42 U.S.C. §§1981 and 1985—is not in issue here. The case is also distinguishable on the merits, as discussed above. In *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir., 1975), there was apparently no allegation that the current refusal to hire was in fact *based* on the prior refusal to hire. The employer had thus not tied the past refusal to the current refusal. (The charge was therefore found timely in relation to the current refusal and an earlier charge, filed beyond the time limit in relation to the earlier refusal, was found untimely since that was the only practice attacked in that earlier charge.)

In *Younger* v. *Glamorgan Pipe & Foundry Co.*, 310 F. Supp. 195 (W.D. Va., 1969), although plaintiff contended that the discriminatory policies which gave rise to his transfer were of a "continuous" nature, his complaint attacked not those "continuous" policies (he did not apparently allege that he had been injured by them after his transfer and within the timely filing period preceding his charge) but merely directly attacked the transfer itself. His charge was untimely as to *that transfer*, the alleged unfair employment practice. Here, by contrast, Mrs. Evans is directly attacking a continuing

seniority practice which is being implemented and causes injury to her today, and her charge was timely *as to that alleged unfair employment practice.*

In *Buckingham* v. *United Air Lines, Inc.,* ..... F.Supp. ....., 11 FEP Cases 344 (C.D. Cal., 1975), the transfers occurred prior to the 1965 effective date of Title VII (and were thus not unlawful); furthermore, neither the pre-Act transferees nor the post-Act terminees could directly challenge the "no-marriage" rule or the agreement ending it (which was consummated within 90 days of the date they filed charges) since they could not show that they themselves were unfairly injured by the rule or the agreement within the 90-day period (the transferees were not then stewardesses and the terminees were not then employees). Similarly, the key distinction in *Kennedy* v. *Braniff Airways, Inc.,* 403 F.Supp. 707, 709 (N.D. Tex., 1975) is that there—unlike here—the past discrimination occurred *prior* to the effective date of Title VII, as the Court took pains to point out; we also note that the case pre-dates this Court's ruling in *Franks, supra.*

Cates v. *Trans World Airlines,* ..... F.Supp. ....., 13 FEP Cases 201 (S.D. N.Y., 1976), *app. pending,* No. 76-7420 (2d Cir.), is entirely distinguishable on its facts: Of the three named plaintiffs, two (Cates and George) filed EEOC charges *over a year and a half after they were laid off pursuant to the challenged seniority practice,* and the Court in fact assumed their day of layoff was the last day on which the seniority practice operated against them (13 FEP Cases at 208). As to the third (Whitehead, discussed in the passage quoted by United), the Court found that he had never actually been denied employment (13 FEP Cases at 208). Unlike Cates and

George, Mrs. Evans filed charges *during* the pendency of the seniority practice, and thus was timely. And, unlike Whitehead, Mrs. Evans is an *identifiable victim* of past discrimination, and is thus entitled to relief. Furthermore, much of the District Court's reasoning in *Cates* is suspect in light of the Second Circuit's scholarly decision in *Acha* v. *Beame, supra.*

The result in *Turnow* v. *Eastern Airlines,* ..... F.Supp. ....., 13 FEP Cases 1227 (D.N.J., 1976), is similarly consistent with the result in *Evans.* There, the Court in fact held that the latest date upon which plaintiff could timely file charges challenging her seniority status was 180 days after her *post-rehire furlough—not* 180 days after the termination which antedated her rehire. Thus, Mrs. Evans' charge here was timely even under *Turnow.*

None of the cited court cases arising under Section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b), involved situations similar to the one at bar—where a present employee challenges a present seniority practice which is admittedly *based on* and gives present effect to prior discrimination by the same employer against that employee. Moreover, all of those cases, having been decided under the NLRA rather than Title VII, were not subject to Title VII's legislative history, which, as set forth above, shows that Congress' purpose encompasses both the "continuing violation" theory and the "perpetuation of past wrongs" principle espoused herein.

In *Local Lodge No. 1424* v. *N.L.R.B.,* 362 U.S. 411, 416-417, 80 S.Ct. 822, 826-827 (1960), this Court was not faced with a situation where the charged party *itself* chose to follow a *new* course of action by which *it* actively relied upon and gave new and pervasively damaging effect to a past wrong; rather, the claimed violation—enforce-

ment of a collective bargaining agreement with an allegedly invalid union security clause—was but a "mere shadow" of the original violation, that is, execution of that same agreement. Unlike the Board in *Lodge No. 1424,* it is not Mrs. Evans who relies on the past to "cloak with illegality" a present act; here, United itself engages in a new course of action by which it taints itself.

American Federation of Grain Millers v. *NLRB,* 197 F.2d 451 (5th Cir., 1952), was decided under the NLRA by the same Circuit which, seventeen years later, issued the Congressionally-approved *Papermakers* decision (*supra*) under Title VII, and involved primarily refusals to bargain and refusals to re-employ strikers who had already been permanently replaced. No on-the-job practices like that alleged here were involved. The Court agreed with the Board that the statute of limitations with respect to a refusal to bargain begins to run with the *first refusal*—as contrasted with Title VII, as to which Congress has clearly stated that the *latest* occurrence of a continuing practice will serve as a focal point of timeliness. *NLRB* v. *McCready & Sons, Inc.,* 482 F.2d 872 (6th Cir., 1973), is distinguishable on the same ground.

Similarly, *NLRB* v. *Pennwoven, Inc.,* 194 F.2d 521 (3d Cir., 1952), and *NLRB* v. *Textile Machine Works, Inc.,* 214 F.2d 929 (3d Cir., 1954), both antedated Title VII; they did not involve new on-the-job practices, or practices admittedly based on past wrongs, like that alleged here, but rather involved refusals to recall and rehire certain employees. (Interestingly, the Court held in *Pennwoven,* under the NLRA, that the statute ran not from the time of termination but rather from the time the employees were first not offered reemployment.) And unlike the seniority practice challenged here, the challenged non-

employment was merely a "shadow" of the discharge. See *Kennan, infra.*

NLRB v. *Childs Co.,* 195 F.2d 617 (2d Cir., 1952), was also a non-Title VII case involving a claim for rehire rather than an on-the-job seniority problem. Under Title VII, the Second Circuit has clearly taken a different position in *Acha* and other cases, cited above, putting it squarely on record as espousing the principle that on-the-job seniority practices which perpetuate the effects of past discrimination are present and continuing wrongs, and that challenges directed thereto are not dismissable as simple attempts to litigate the past wrong.

The few additional Title VII decisions cited by *Amici* as supporting their interest in this cause are not applicable here. *Cisson* v. *Lockheed-Georgia Co.,* 392 F.Supp. 1176 (N.D. Ga., 1975), involved a challenge to a one-time demotion, *not* a seniority practice like the one challenged here. (Also, compare, *Marquez, supra,* n. 9.) In *Stroud* v. *Delta Air Lines, Inc.,* 392 F.Supp. 1184 (N.D. Ga., 1975), *appeal docketed,* No. 76-2130 (5th Cir., May 21, 1976), plaintiff stewardess' termination occurred before Title VII became effective and she had never been rehired. (No on-the-job seniority practice was in issue.) And, significantly, Judge Freeman—who decided both *Cisson* and *Stroud*—modified his views less than one month later in *Stroud* v. *Delta Air Lines, Inc.,* 10 FEP Cases 498, 499 (N.D. Ga., 1975), wherein he recognized that *seniority practices* which perpetuate the effects of past discrimination are continuing wrongs under Title VII.

In *Culpepper* v. *Reynolds Metals Co.,* 296 F.Supp. 1232 (N.D. Ga., 1969), *rev'd on other grounds,* 421 F.2d 888 (5th Cir., 1970), the challenged employment practice was the denial; not of seniority and its perquisites, but of the award of a bid-for-job.

Lastly, in *Smith* v. *OEO for Arkansas,* 538 F.2d 226 (8th Cir., 1976), plaintiff challenged nothing more than a one-time refusal to hire and could argue no more than that his non-employment was continuing.

In virtually all of the other cases cited by opposing parties—with the *seeming* exception of *Collins,* discussed *infra*—the only practice being challenged was the actual discharge. None of those cases involved an attack upon a current and continuing seniority practice such as that being challenged here by an employee who is today suffering injury *on the job* because of it. That practice is a continuing one, whereas a discharge, standing alone, is not.

That distinction is critical—for, as the Eighth Circuit noted in *Olson* v. *Rembrandt Printing Co.,* 511 F.2d 1228, 1234 (8th Cir., 1975).

> "The rationale underlying the allowance of actions for continuing discrimination is to provide a remedy for past actions which operate to discriminate against the complainant at the present time."

IV.

Collins And Evans Are Compatible—There Is No Conflict Among The Circuits.

As Judge Cummings noted in dissenting to the Court of Appeals' first opinion (Appendix, at 30):

> "The alleged continuing discrimination in *Collins* was the failure to rehire plaintiff. Title VII, however, imposes no obligation on the employer to hire anyone *unless the refusal is motivated by discrimination.* There is no evidence in *Collins* that the decision not to rehire the plaintiff was based at all *upon the past act of discrimination.*" (Emphasis supplied.)

Unlike the case at bar, there was no allegation in *Collins, supra,* that United's refusal to rehire her was *based* at all

upon her 1967 termination; rather, plaintiff in *Collins* in effect sought to have the Ninth Circuit declare that the failure to rehire was *per se* unlawful simply because her continuing non-employment to that point was attributable to the prior discrimination. *Collins* thus was truly challenging the mere passive effects of the prior termination and nothing more; no present act of United, either on or off the job, was actually *based* on that prior discrimination.

This is a crucial difference. United incorrectly states that the Court of Appeals confused the *effects* of an act of discrimination with the *act* of discrimination itself. Rather, in likening *Collins* to *Evans,* United has confused the mere passive effects of past discrimination (*Collins*) with a present act or practice, explicitly *based* on the past discrimination, which gives new on-the-job effect to the past discrimination, reactivates it in a new form, and results in present disparity and injury (*Evans*).

Viewed in this light, it is evident that the seeming anomaly suggested by United between the rights of former employees who are not rehired and former employees who are rehired simply does not exist. In both cases, one must look to the current practice being challenged, and determine whether that current practice is based upon prior discrimination. If, as in *Collins,* it is not so based, the plaintiff fails. If, as in *Evans,* the current practice *is* improperly based, the plaintiff succeeds. Thus, the cases are logically and pragmatically consistent with each other.

United's suggestion that *Evans* will discourage the rehire of former discriminatees is absurd. If anything, *Evans* would in fact have the opposite effect—for, as the point of distinction between *Collins* and *Evans* demon-

strates, it may well be held *unlawful* for an employer to *base* a refusal to rehire a former employee on the fact that said employee was a former discriminatee. (No such allegation was made by plaintiff in *Collins*, of course.)

The compatibility of *Evans* and *Collins* has just been reinforced by at least two very recent decisions within the Ninth Circuit. The same Court of Appeals which decided *Collins* recently cited *Evans* with approval for the proposition that current seniority preferences "perpetrate [sic] the effects of past discriminatory practices [there, in hiring] and constituted a present violation of Title VII". *Gibson* v. *I.L.W.U., Local 40,* ..... F.2d ....., 13 FEP Cases 997, 1004, n. 20 (9th Cir., 1976).

This development was noted by Judge Orrick in *Kennan* v. *Pan American World Airways, Inc.,* ..... F.Supp. ....., 13 FEP Cases 1530 (N.D. Cal., 1976), a case virtually identical to *Evans*. There, rehired female flight attendants challenged Pan Am's continuing failure to credit them with seniority, based upon prior discriminatory forced separations pursuant to that airline's former no-pregnancy rule for stewardesses. In denying Pan Am's motion to dismiss for failure to file EEOC charges within 90 days of the prior terminations the Court reasoned that "*Collins* and *Evans* are quite reconcilable":

> "Whereas an employee's so-called 'continuing nonemployment' (*Collins*) is merely a mechanical consequence or 'effect' of the original forced resignation, an employer's act of reemployment without retroactive seniority (*Evans*) constitutes, in part at least, an affirmative perpetuation of, an act in essence based upon, the original discriminatory termination. Thus, it is quite consistent to hold an employer legally accountable for the latter, but not the former, where suit on the original discriminatory termination is barred as untimely." (13 FEP Cases at 1533)

• • •

> "In the instant case, the valuable statute of limitations policy of guarding against stale complaints is barely threatened. Here we have original discriminatory acts of forced resignation pursuant to a blanket, facially discriminatory policy of terminating pregnant women. There are few, if any, individual circumstances which might require proof at trial; in fact, at oral argument, defense counsel was unable to describe any 'statute of limitations'—related prejudice that might accrue. Because there is little or no visible prejudice to Pan Am by virtue of the lapse of time since its original act of discrimination, defendant's need for statute of limitations protection is minimized here. Moreover, the fact of reinstatement without back seniority and not the original termination is the focus of this lawsuit—the original discrimination has been perpetuated in a new form. Again, this is the critical difference between the instant case and *Collins,* where the purported 'continuing act' of discrimination was but a shadow or functional equivalent of the original act. Seniority is, in its very nature, a future-oriented, perpetuating, continuing structure—one which pervades and controls the realm of future benefits. The *Collins* 'event' of 'continuing nonemployment', on the other hand, points entirely to the past event of forced resignation.
>
> Thus, while the importance of the statute of limitations policy is quite curtailed here, the weight of Title VII's substantive policy is maximized." (13 FEP Cases at 1534).

Interestingly, as to the suggestion that *Evans* and *Collins* might create an anomaly between the rights of rehired

and not rehired former discriminatees, which we have shown to be without substance, Judge Orrick reasoned:

> "However, if such a risk is built into the *Evans-Collins* result, and even if such a risk is more real than hypothetical, the Court concludes that such a risk is worth the legal result." (13 FEP Cases at 1534).

V.

The Court Of Appeals' Decision Is Entirely Consistent With This Court's Reasoning In Franks v. Bowman.

United has taken the position that, since *Franks* was, strictly speaking, a remedy case and did not involve time limits, it was wrong for the Court of Appeals to take guidance from this Court's reasoning therein. United misconceives the application of *Franks* because of its misconception of the issue in *Evans*. Because the question here is not whether the charge was timely, but is, rather, *whether the challenged seniority practice is illegal*, the reasoning this Court followed in *Franks* bears directly on the issue at bar.

In order to show that the Court of Appeals' analysis was wrong, United has to establish that the challenged seniority practice, even though it creates a current disparity and perpetuates the effects of past discrimination, is not legally subject to Mrs. Evans' line of attack under Title VII. Since this case arises on a motion to dismiss and Mrs. Evans has advanced a clear theory of relief, there are two possible ways (in addition to the policy arguments dealt with hereinabove) in which United could logically have defended: (1) by using case law to demonstrate the lack of support for Mrs. Evans' legal theory and the inapplicability of the cases she ad-

duces in her behalf, and/or (2) by seeking to rely upon a statutory protection, as the Court of Appeals recognized. United's defense has, instead, largely been one of avoidance. It has not, for the most part, questioned the applicability of the massive pertinent case law. It has renounced reliance on Section 703(h) of the Act, and persists in adducing inapposite cases for the mutually agreed-upon proposition that, *if* Carolyn Evans were simply and solely attacking the 1968 termination, *then* her charge would have been untimely. What United fails to realize is that, in order for that argument to succeed, it has to show that its current seniority practice is immune from the attack being made upon it.

In light of the real issue presented by this case and as stated by the Court of Appeals in Part III of its final opinion, *Franks'* application herein is simple. Bowman had interposed the defense—albeit in a remedy case—that Section 703(h) immunized its seniority policy from attack, alteration, or interference under Title VII. In order to deal with that defense, this Court had to decide the nature of the substantive protection afforded by that section. It did so quite clearly:

> ". . . [I]t is apparent that the thrust of the section is directed towards defining what is and what is not an illegal discriminatory practice in instances in which the post-Act operation of a seniority system is challenged as perpetuating the effect of discrimination occurring *prior to the effective date of the Act.*" (424 U.S. at 761; emphasis supplied)

This being the case, it is readily apparent that if, as here, the operation of a seniority system is challenged as perpetuating the effects of discrimination occurring *after* the 1965 effective date of the Act, then Section 703(h)

of the Act does not apply and cannot "be used to interpose a legal bar to Evans' theory", as the Court of Appeals correctly concluded, and so the instant claim is cognizable under the Act. The fact, noted above, and in *Evans,* that Congress made no changes in this Section in 1972 despite preexisting case law supportive of *Evans* is further reason to conclude that the Court of Appeals' disposition of this case comports with the legislative intent behind the Act. As this Court reconfirmed in *Franks*:

> ". . . Congress intended to prohibit *all practices in whatever form* which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin. . . ." (424 U.S. at 763; emphasis supplied)

This Court said more in *Franks,* of course. It is apparent that an essential premise for the Court's conclusion, that retroactive seniority is an appropriate form of relief for the identifiable victims of past discrimination in hiring, is the realization that without such relief, the effects of that past discrimination would be continually perpetuated by the employer's seniority policy, and a current and future disparity would exist, for the employee would

> ". . . perpetually reman subordinate to persons who, but for the illegal discrimination, would have been in respect to entitlement to these benefits his inferiors." (96 S.Ct. at 1266)

It was in this context that the Court of Appeals examined the applicability to this case of the rationale which had been applied by the long line of cases set forth in Part II hereinabove, and so it found that "[t]he teaching of *Franks* confirms these holdings" (Appendix, at

40). Moreover, the legislative history which this Court heeded in *Franks* is equally applicable here.

Mrs. Evans does not seek to dismantle United's seniority *system*—she merely wishes the inequity produced by United's practice in its application to her to be removed, so that she may assume her rightful place within that system. We note, too, that the concern addressed in the dissenting opinions of this Court in *Franks*—as to the effect on other employees of "competitive seniority" (as opposed to "benefit seniority") relief—is not presented by *Evans* at this time and is thus not ripe for review. In any event, the practical ramifications of a single aspect of the relief sought should not in all fairness be allowed to affect the determination as to whether or not Mrs. Evans has alleged a substantive violation of the Act sufficient to withstand United's motion to dismiss. The district court has ample latitude to fashion appropriate relief—in the form of monetary, seniority, or other relief. In the final analysis, of course, the potential concerns of other employees and of unions in the seniority area, referred to in the opposing briefs, cannot bar Mrs. Evans' claim, since that is a pure remedy issue which this Court clearly settled in *Franks.*[13]

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[13] We note, too, that the relief sought for Mrs. Evans will affect but one out of the thousands of flight attendants employed by United. Whether others like her exist, and the nature of the precise relief to be afforded in this case, are questions for the trial court to decide.

CONCLUSION

For all of the foregoing reasons, Carolyn Evans respectfully urges that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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